Identifying obstacles to European Works Councils' creation and effectiveness – are there lessons to be learnt from some national jurisdictions?

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1 Introduction

The European Directive on European Works Councils (EWCs)[1] undoubtedly constitutes one of the most important achievements of Social Europe. The Directive goes beyond a national framework of worker representation and adapts it to the transnational, or at least European, structure of companies. The Directive has also contributed to the exportation of a European Social model based on workers' representation and Social dialogue. In 2017, 1152 EWCs were active[2] and 1114 multinationals companies have a EWC. The EWCs have also been a key actor in the development of transnational negotiation and the conclusion of transnational collective agreements.

Nevertheless, almost 25 years after the adoption of the first Directive in 1994, it is also beyond doubt that important weaknesses affect the functioning of the EWCs. First, many eligible multinational companies (around more than half according to figures from the European Trade Union Institute) do not have established EWCs. Second, the effectiveness of the information and consultation rights is questioned: the information given could be weak and not allowing for meaningful consultation, consultation could also be of a poor quality. The timing of information and consultation is also an issue: EWCs are often consulted where decisions are already taken.

The adoption of the Recast Directive in May 2009 aimed to address the deficiencies identified. According to its preamble, '*It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees' transnational information and consultation rights',* and *'increasing the proportion of European Works Councils established'*. It was, however, doubtful that the Recast Directive could meet these goals. Without denying the improvements effected by the Recast Directive, the modifications did not seem sufficient neither to contribute to the expansion of EWCs in those groups where none exist to date nor to create a new dynamic in those which exist so as to make them indispensable players in, for example, transnational restructuring exercises. And this scenario was confirmed.

This paper will present some of the legal obstacles first to the creation and then to the effectiveness of EWCs, using some national case-law to highlight these obstacles. Regarding the national case-law, the number of the court rulings concerning EWCs is small. This small number can be explained in a number of ways. First, the number of EWCs, compared with national works councils (or other types of workers' representation at national level), is very low and so, therefore, are the disputes linked to the creation and functioning of EWCs. Second, it seems that very often disputes are settled out of court. The fact that most of the EWCs are set up by agreements could also explain this low level of litigation. However, the low level of cases could also have other reasons like the lack of clear rules on the legal status of the EWCs (legal personality, court capacity), the uncertainties to define at the various stages of the procedure who has standing with regard to the application of the EWC Directive,[3] and the means available to EWCs in legal proceedings.[4]

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[1] Directive 94/45/EC and Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast).
[2] According to the EWC datebase of the ETUI, see the table EWCs and SE works councils growth over time (http://www.ewcdb.eu/stats-and-graphs).
[3] F. Dorssemont, 'The European Works Council Directive and the Domestic Courts', in F. Dorssemont and Th. Blanke (eds.), The Recast of the European Works Council Directive, Intersentia, 2010, p. 226.
[4] R. Jagodzinski (ed), Variations on a theme ? The implementation of the EWC Recast Directive, ETUI 2015, p. 188. For example, in Germany, there were two rulings by lower courts on the issue whether a European Works Council can claim injunctive relief if the central management has breached rights to information and/or consultation. On two occasions, it was held that there is no such right (see, in particular, State Labour Court Baden-Württemberg of 12.10.2015 – 9 TaBV 2/15 and State Labour Court Cologne of 08.09.2011 – 13 Ta 267/11).

The meaning of the decisions themselves should also be analysed with caution: they are rarely from national Supreme Courts, and are often based on the terms of the agreements which set up the EWC and not on the terms of the EWC Directive and/or of the national law implementing the Directive. However, bearing in mind these limits, some lessons can be learnt from these cases.

2 A favourable national legal framework

If one looks at the figures on EWCs, it appears that they are much more established in companies headquartered in particular countries, such as Germany, France, United Kingdom or Sweden. It is one consequence of the size of the countries and of their economies. However, this does not explain the low number of EWCs set up in companies headquartered in the Member States that joined the EU after 2004. The fact that EWCs are widespread in some countries like France and Germany could also be explained by a national context of industrial relations favourable to the recognition and to the effectiveness of EWCs. First of all, EWCs could be perceived as an extension of national workers' representatives. Secondly, the national legal environment is also an important factor of effectiveness of EWCs. The situation of workers' representatives in terms of protection and vindication of their rights is indeed particularly important as well as the sanctions. Article 10 of the Recast Directive clearly requires Member States to provide legal means to EWCs (legal capacity and recognised judicial interest to go to court) but it also leaves a lot of freedom to Member States where implementing it. Looking at the national levels,[5] indeed, EWCs enjoyed, since the adoption of the transposition laws of Directive 94/45/EC, a very clear capacity to lawfully act and represent employees' interests in only four Member States (Austria, France, Romania and Sweden). In other countries, the right to go to court is not always clearly guaranteed to EWCs. Only in seven countries, including Germany and the United Kingdom, this right was indirectly recognised sometimes by external procedural law. If we look at the implementation of Article 10.1 of the Recast Directive,[6] there are still some countries where EWCs have neither legal personality nor any of its functional basic rights that allow recourse to justice, which means that at least the access to justice does not appear clear and transparent. Some countries have also copied/pasted Article 10.1 without clarifying the meaning of this article. It means that very often there is a lack of clear rules on the legal status of ECWs and on the means available to them in proceedings. If we now look at the sanctions available under national laws, the conclusion is that the variety of sanctions available in Member States does not give workers equal redress. Injunctions issued in summary proceedings are very rarely recognised with the exception of France. This can partly explain why EWCs are more frequent in some countries than in others and why there are more cases and litigation in these countries.

3 Some legal obstacles to the creation of European Works Councils

Regarding the creation of EWCs, cases reveal some difficulties in access to the appropriate information and also identification of who has locus standi at that stage.

At least one legal obstacle has been removed with the three decisions of the CJEU given as a result of preliminary references on the 1994 EWC Directive. All raised the issue of access to information required to set up the Special Negotiation Body (SNB),

[5] *See R. Jagodzinski (ed),, op.cit. chap. 4, p. 107 and seq.*

[6] *« 1. Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings'.*

to determine the scope of the group of undertakings or of reaching the relevant employee thresholds.[7] The Recast Directive took into account the CJEU solutions and incorporates the solutions proposed by the Court in its case-law. Henceforth, Article 4(4) provides that the management of every undertaking belonging to the Community-scale group of undertakings, as well as the central management or deemed central management of the Community-scale group of undertakings, shall be responsible for obtaining and transmitting to the parties concerned the information required to open negotiations, in particular '*the information concerning the structure of the undertaking or the group and its workforce'*.

There are however other legal obstacles to the creation of EWCs which can be highlighted by the Manpower case (see the description of the case in the Annex). It took four years, one proceeding in France and another one in England, for the EWC agreement to be concluded in March 2017.

The case illustrates some of the legal difficulties faced by workers when they ask for the creation of a SNB or EWCs. Access to relevant information is still difficult.[8] The identification of the company responsible for the establishment of the SNB could also be problematic and in turn it involves some important difficulties to identify which national judges are competent. Article 5.1 of the Directive is also problematic. According to this article, '*the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States'*. As the creation of EWCs is a right for workers, it seems unnecessarily complicated to require a written request of 100 employees. In Luxembourg, a Court dismissed the claim of the works councils of a German and a Spanish company considering that the claimants did not have the capacity to request the establishment of a EWC. Indeed, according to Article 5 of Council Directive 94/45/EC transposed into national law (L. 432-2 of the Labour Code), the request to initiate negotiations must be made by at least 100 employees or their representatives. The Court determined that it was not proven that the German and Spanish Works Councils met this criterion.[9]

More generally and more importantly, these examples also show that the Directive fails to give clear and precise legal instruments to enforce the rights granted to workers and their representatives by the Directive at this stage.

4 Some legal obstacles to European Works Councils' effectiveness

The effectiveness of EWCs can be measured in many ways, but it predominantly depends on EWCs being provided with information and opportunities to express their opinion. Very often these conditions are not met: EWCs are not sufficiently informed and consulted and/or the information and consultation of EWCs often takes place too late to impact decision making.

It could be argued that some of the persisting ambiguities of the Directive (and of the national laws implementing the Directive) contribute to this lack of effectiveness. This is especially the case regarding the definition of the competences of the EWCs which raises two specific questions: the definition of the transnational competence of EWCs

[7] *C-62/99 Bofrost (2001)ECR I-2579 ; C-440/00 Kühne and Nagel (2004) ECR I-787 ; C-349/01 Anker (2004 ECR I-6803).*
[8] *See CAC Decision: Unite the Union & Facilicom Services Group of 11 January 2017.*
[9] *See European Labour Law Network, Luxembourg, Implementation of a European Works Council Directive 512-07-2011), http://www.labourlawnetwork.eu/national%3Cbr%3Elabour_law/national_court_rulings/national_court_decisions_-_labour_law/prm/64/v__detail/id__1539/category__22/index.html*

and the timing of information and consultation of EWCs in relation to national rights to worker involvement. In both cases, what is at stake is the articulation between national and European levels of workers' representation.

The Recast Directive limits the EWCs competence to transnational issues, defined as those concerning all the group of undertakings or at least two undertakings in the group based in two different Member States (Article 1.4). On this issue, the Directive is a backward step from the 2001 Directive on worker involvement in the European Company which gives the representation structure a wider competence. However, the Directive's preamble indicates a less restrictive approach. It provides that '*The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States*' (Recital 16). This recital appears to include within the EWC's competence matters affecting only one site of the group, though this appears to be excluded by Article 1.4. However, many Member States have not implemented this part of the Directive, and the agreements concluded very often reproduced the ambiguities of the Directive.[10]

A French case shows that a narrow concept of transnationality could limit the effectiveness of EWCs. The case is about a restructuring in the Wolseley group. Wolseley's EWC represents 16,000 workers in eight European countries and was established by agreement in 1996. The agreement has been renewed in 2002 and 2008 and it provides for consultation on transnational matters to the exclusion of matters regarding only one country. When there were redundancies in the French subsidiary in 2013, the EWC was neither informed nor consulted and the court proceedings were filed by French workers dismissed by Wolseley. They claimed compensation because the EWC was not informed and consulted. They argued that the EWC should have been informed and consulted as the restructuring had a transnational dimension. For the French Supreme Court, however, the agreement was a "voluntary" agreement and the French Labour Code defining the transnational competence of EWCs did not apply.[11]

The Court of appeal of Versailles also issued a decision on the notion of transnationality as regulated by the Recast Directive 2009/38/EC[12] where the Court applied a less restrictive notion of transnationality. The EWC of Transdev submitted a complaint against the company management alleging infringement of the workers' right to information and consultation with regard to the company's demand of repayment of a loan to SNCM, which put the latter into default. The EWC applied for an injunction. The object matter under the court's scrutiny was the delimitation of the definition of transnationality as modified by the Recast Directive 2009/38/EC. The Court dismissed the claims of the Transdev's EWC concerning its information and consultation on the future of the subsidiary SNCM in Marseille. As the two boards had their headquarters in France, the case involved only one country and there was no

[10] See R. Jadodzinski, Variations on a theme ? The implementation of the EWC Recast Directive, op. cit.
[11] Cass. Soc. 1 February 2017, n° 15-24571. Another case from United Kingdom seems also to adopt a restrictive concept of "transnationality". "EWC/7/2012 Mr Haines and The British Council The complaint under Regulation 21(1A) was that the employer had failed to provide information in a timely manner, and failed to provide sufficiently detailed information, in advance of European Works Council meetings. The applicant also submitted that the employer had failed adequately to inform and consult employees about the trial of a system for performance related pay. Although the applicant argued that this could have implications across Europe, the Panel decided that the trial did not constitute a "transnational matter" as it was confined to just one EU Member State, Romania. Therefore, the obligation to inform and consult under Regulation 18A(7) was not realised. The Panel further observed that pay, with the exception of equal pay, was excluded from matters on which the EU could legislate.
[12] CA Versailles, 21 May 2015, n°14/08628. Also see CA Versailles, 14 June 2006, CT0009.

transnationality. The court checked whether the claim had significance for European workers although only one Member State was involved. As SNCM represented only 2.5 per cent of the group's staff, there was no impact on European workers. In other words, questions which necessitate preliminary consultation of the EWC must have an international or European dimension as regards their effects. Otherwise, consultation of the EWC was not necessary.

The problem of the relationship between national and European procedures remains entirely unresolved, despite the fact that some French cases have demonstrated the need to establish a chronological order of intervention of the various worker representatives. The final text devotes two provisions to this issue without resolving it. On the one hand, it is henceforth provided (Article 6.2 c) that the agreement establishing the EWC must provide arrangements for linking information and consultation of the EWC and national employee representation bodies, in accordance with the principles set out in Article 1.3 (that is to say with respect for the EWC's transnational competence). On the other hand, Article 12 generally provides that '*information and consultation of the European Works Council shall be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles set out in Article 1.3'*. The Directive therefore charges the SNB to deal with this issue, but its freedom to do so can be limited by Article 12. One can therefore easily imagine situations in which prior consultation with the EWC limits the competences of national representatives. The reality is that, while the term linkage is used, the national and European procedures are still viewed as independent of each other, each one having a specific competence. Yet the role of EWCs must be conceived alongside that of national representation. What is more, the EWC can look at restructuring operations from an overall perspective. Given its greater area of action, it was thus necessary to define explicitly the sequencing of information and consultation by laying down the principle that the EWC would precede national procedures. In an embryonic fashion, this sequence of Europe first, or at the very least, of national and European procedures running alongside each other, is found in the preamble which provides: '*National legislation and/or practice may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national employee representation bodies*' (recital 37). It is thus this principle which should guide the interpretation of the Directive.

Some French cases deal with this issue without always reaching a common solution. For example, the absence of priority of consultation of the EWC was recalled by the Court of 1st instance of Sarreguemines in the "Continental case" in which the closure of a factory was announced unilaterally by the board without respecting the consultation procedure.[13] The judge underlined that the EWC agreement was silent on the priority order of the consultation. Sometimes, the court ruled that the EWC must be consulted first. This priority was justified by the transnational nature of the project, the consistency and the beneficial effect of the consultation.[14] The Court of 1st instance of Melun held that the Works Council cannot give a beneficial opinion on a cessation of activities plan without reviewing the EWC's opinion.[15] Concerning the "Seita case", here again, the Court of 1st instance of Paris concluded that the EWC must be consulted first.[16]

[13] *TGI Sarreguemines, 21 April 2009, n° 09/00048.*
[14] *TGI Paris, 26 April 2011, n°11/00433.*
[15] *TGI Melun, 13 October 2006, n°06/00357.*
[16] *TGI Paris, 10 October 2003, n°03/59933.*

5 Conclusion

Not all obstacles to the creation of EWCs and their effectiveness are legal. The size, the unionisation of a company or the company policy are also important factors of effectiveness of EWCs. However, the legal environment is also essential as highlighted by the 1994 Directive itself. Without a Directive, the number of EWCs would have remained low and certainly marginal. Some legal obstacles have been identified in this paper: a lack of clarity on the rules on the legal status of ECWs and on the means available to them in proceedings, the lack of uniformity of sanctions, the difficulty to access information and to identify who has locus standi at the early stage of the procedure when a SNB has not yet been set up, the narrow concept of transnationality and the rather weak rules in the Directive on the communication between EWCs and the national workforce and workers' representatives. Without a new Directive, these obstacles will remain and it will be for the SNB and the central management to reach agreements removing, when possible, these obstacles.

ANNEX – The Manpower case

The request for establishment of a EWC had been made by employee representatives for several countries on 28 May 2013. According to French trade unions, after expiration of the legally defined 6-month period, a default EWC should be immediately established under French jurisdiction, as France had the largest workforce of the company. However, the French judges (17 July 2014, TGI Paris)[17] ruled that London is to have jurisdiction for the EWC and rejected the proceedings filed against the company in France. According to the judges, British jurisdiction was applicable as a consequence of an internal email dated 28 September 2011. This was a request by US central management asking the London office to conform to all of the obligations resulting from the EWC Directive. Employee representatives were, however, not informed about this communication. A SNB was then set up in the United Kingdom, but was slow in reaching an agreement and a claim was made by a single complainant to the Central Arbitration Committee (CAC)[18] arguing that the Manpower Group (the employer) had failed to establish a EWC within the three years following the date of the valid request. However, the employer argued that the complainant had no *locus* in bringing the complaint to the CAC, as the British regulation reserved to the SNB the right to bring such a complaint, should a SNB be in existence. Here, the SNB was still in place and was in the final stages of concluding a EWC agreement; the SNB and the employer having agreed to extend the three year negotiation period in order to reach a mutually beneficial agreement. A EWC agreement (the EWC Agreement) was concluded shortly thereafter in March 2017. The CAC panel agreed with the employer. It found that the SNB was very much alive, even if a little slow moving. It was fulfilling its purpose of seeking to conclude an agreement. The SNB continued in existence therefore until the EWC Agreement came into force in March 2017. Since the SNB existed in January 2017 when the complaint was lodged, only the SNB could be a relevant applicant. The panel continued that the purpose of the regulation was clear in that it enables the SNB to enforce compliance and keep the employer's toes to the fire, should the need arise. It is only if a SNB does not exist, that an employee, such as the complainant in this case, has *locus standi* as a relevant applicant. Up until that date, the SNB was the only potential relevant applicant.

[17] *N°2/2014 of EWC News, http://www.ewc-news.com/en022014.htm#3.2*
[18] *The CAC is a British independent body competent to resolve collective disputes.*